

<p>DISTRICT COURT, LARIMER COUNTY, COLORADO Larimer County Justice Center 201 Laporte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 498-6100</p>	<p>DATE FILED: February 1, 2019 2:38 PM FILING ID: B35CB19932815 CASE NUMBER: 2018CV220</p>
<p>Plaintiff: STACY LYNNE</p> <p>v.</p> <p>Defendants: NOAH BEALS, Senior Planner, City of Fort Collins, in his individual and official capacity, and JEREMY CALL, Senior Associates – Logan Simpson Design, Contractor for the City of Fort Collins, in his individual and official capacity</p>	<p>COURT USE ONLY</p>
<p>Kimberly B. Schutt, #25947 WICK & TRAUTWEIN, LLC P.O. Box 2166 Fort Collins, CO 80522 Phone: (970) 482-4011 Email: kschutt@wicklaw.com</p>	<p>Case Number: 2018 CV 220</p> <p>Courtroom: 3C</p>
<p align="center">DEFENDANT BEALS' REPLY IN SUPPORT OF HIS MOTION TO DISMISS and REQUEST FOR AWARD OF ATTORNEY'S FEES</p>	

COMES NOW Defendant Noah Beals, by and through his counsel, Wick & Trautwein, LLC, and respectfully submits this Reply in support of his Rule 12(b)(1) motion to dismiss with prejudice the Plaintiff's Complaint against him.

1. Defendant Beals has moved the Court to dismiss the Plaintiff's Complaint on the grounds that the tort claims alleged against him are barred by the immunity afforded him as a public employee under the Colorado Governmental Immunity Act ["CGIA"]. The motion is

brought pursuant to C.R.C.P. 12(b)(1), mandating dismissal for lack of subject matter jurisdiction, not 12(b)(5).¹

2. Plaintiff's response to the motion wrongfully characterizes Mr. Beals' motion as asserting that he is above the law, pointing to the exception to immunity for willful and wanton conduct found in C.R.S. §24-10-10. In doing so, Plaintiff completely misses the point of Mr. Beals' motion. While he acknowledges that such an exception to immunity exists, the motion asserts that the Plaintiff has failed to allege a sufficient factual basis to support such a claim for willful and wanton conduct under the standards set by the Supreme Court of Colorado in *L.J. v. Carricato*, 413 P.3d 1280, 1288 (Colo. App. 2018). Thus, Mr. Beals is simply asking the Court to apply the law here.

3. Again, under that applicable legal standard, a plaintiff may not rely upon conclusory allegations of willful and wanton conduct. At a minimum, the complaint must allege "specific facts to support a reasonable inference that the employee was consciously aware that his or her acts or omissions created *danger or risk to the safety of others*, and that he or she acted, or failed to act, without regard to the *danger or risk*." *Id.* (emphasis added); *see, also, Martinez v. Estate of Bleck*, 379 P.3d 315, 322-23 (Colo. 2016) (declining to choose one definition of "willful and wanton" conduct, but indicating they all share a common feature - a conscious disregard of danger to others).

4. The Supreme Court's articulation of this test contemplates a public employee's conscious disregard for danger or risk to one's health or safety, not the type of harm to reputation

¹ As noted in the motion, the Complaint could also be dismissed under 12(b)(5) due to the Plaintiff's undisputed failure to comply with the rules of pleading set forth in C.R.C.P. 8 and 10. It is more than a mere issue with her writing style, as the Plaintiff suggests. However, the Court need not get to those grounds for dismissal if it determines the case is jurisdictionally barred.

caused by an alleged defamation. This is consistent with the exceptions to immunity for a public entity found in C.R.S. §24-10-106(1), all of which embody some act by a public entity or employee that creates a danger or risk to a person's health or safety.² This interpretation is also consistent with the definition of "dangerous condition" found in C.R.S. §24-10-103(1.3), which defines it to mean "either a physical condition of a facility or the use thereof that constitutes an *unreasonable risk to the health or safety of the public...*" [Emphasis added].

5. Here, it is clear from the four corners of the Complaint that Plaintiff has not alleged – and cannot allege in this context -- a sufficient factual basis for willful and wanton conduct as defined above.³ In reaching this conclusion, the applicable standards make clear the Court is *not* to give the Plaintiff the benefit of all reasonable doubts, as she contends. Rather, as pointed out in Defendant Beals' motion, a different standard applies to this Rule 12(b)(1) motion: the Court is to weigh the evidence and satisfy itself as to the existence of its power to hear the case, *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924-25 (Colo. 1993), with the burden of falling on the Plaintiff to establish jurisdiction. *Delk v. City of Grand Junction*, 958 P.2d 532, 533 (Colo. App. 1998). The Plaintiff simply has not and cannot meet that burden here.

6. Finally, the Court may resolve this issue as a matter of law on the pleadings given Plaintiff's failure and inability to allege sufficient facts to sustain a claim of willful and wanton conduct under the applicable standards – there simply is no reasonable inference that can be made

² For example, operation of a motor vehicle, a dangerous condition of a public building, a dangerous condition caused by accumulation of snow and ice, etc.

³ As discussed in his motion, Defendant Beals contends that the allegations of the Complaint also fail to state a claim for defamation. Plaintiff's many arguments and accusations in her response regarding that issue are simply not supported by a fair reading of the allegations in her Complaint. Again, however, the Court need not reach that issue given the lack of subject matter jurisdiction here.

from the Complaint that Mr. Beals acted in conscious disregard of a danger or risk to the Plaintiff's safety. The Court is not required to hold an evidentiary hearing or allow discovery where, as here, there is no evidentiary dispute as to jurisdiction that warrants such proceedings. *Finnie v. Jefferson County Sch. Dist. R-1*, 79 P.3d 1253, 1260 (Colo. 2003); *Tidwell v. City and County of Denver*, 83 P.3d 75, 86 (Colo. 2003).

WHEREFORE, Defendant Beals again respectfully requests the Court to dismiss with prejudice all of Plaintiff's tort claims against him, and award him his reasonable attorney's fees and costs for defense of this action as is required under both C.R.S. §24-10-110(5)(a)(c) and C.R.S. §13-17-201.

Respectfully submitted this 1st day of February, 2019.

WICK & TRAUTWEIN, LLC

By: s/Kimberly B. Schutt
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CERTIFICATE OF ELECTRONIC FILING

The undersigned hereby certifies that a true and correct copy of the foregoing **DEFENDANT BEALS' REPLY IN SUPPORT OF HIS MOTION TO DISMISS AND REQUEST FOR ATTORNEY'S FEES** was filed via the Colorado Courts E-Filing System and served this 1ST day of February, 2019, on the following:

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A courtesy copy was also emailed to Ms. Lynne at stacy_lynne@comcast.net

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s/ Jody L. Minch

[This document was served electronically pursuant to C.R.C.P. 121 §1-26. The original pleading signed by defense counsel is on file at the offices of Wick & Trautwein, LLC]